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In re Operation of the Mo. River Sys. Litig., 516 F.3d 688 (8th Cir. 2008)

Missouri claimed that the U.S. Army Corps of Engineers ("Corps") made revisions to the 2004 Missouri River Mainstem Reservoir Master Water Control Manual (the "Master Manual") in violation of the National Environmental Policy Act ("NEPA") by failing to provide a supplemental environment impact statement ("SEIS") with the revisions. The Corps revised the Master Manual to address changes needed in the current Missouri River water control plan in order to protect wildlife determined to be at risk by the U.S. Fish and Wildlife Service ("FWS") under the Endangered Species Act. The FWS suggested different courses of action for the Corps to take in a Biological Opinion ("BiOp"), the most significant being a "spring rise" or a 30-day controlled water release from Gavins Point Dam every three years.

The Corps identified five choices for modifying the water control plan; four were Gavins Point Dam spring rise/summer low flow release alternatives modeled after the FWS's Reasonable and Prudent Alternative ("RPA") in its BiOp, and the fifth option was a Modified Conservation Plan which did not involve a spring rise. The Corps' Final Environmental Impact Statement ("FEIS") chose the fifth option, observing that the plan could violate the Endangered Species Act because it did not include a spring rise, as recommended by the FWS, to protect the species at risk. The FWS indicated that the Corps had two years in which to devise a plan with effects similar to a spring rise, or the FWS would compel the Corps to adopt a "default plan" which would include a spring rise.

The Corps implemented the Modified Conservation Plan in its 2004 Master Plan, noting that it would still consider a spring rise as required by the FWS's BiOp, and organized a Plenary Group in 2005 to help in addressing this. The Corps then issued a draft of an Annual Operating Plan and technical specifications for a Spring Pulse Water Control plan for public comment; this plan included a bimodal spring rise from the Gavins Point Dam. After comparing this bimodal spring rise plan to its prior five plan modification options, the Corps issued an environmental assessment ("EA") with its analysis, and stated that the bimodal spring rise plan did not require a supplement document to the

Corps' prior FEIS because the bimodal spring rise plan did not pose any new environmental impacts not already addressed by the Corps' prior FEIS. Missouri filed suit to enjoin implementation of the Corps' spring rise plan as spring rises threaten downstream flood control.

The Minnesota district court held that the Corps did not violate the NEPA in not preparing an SEIS or a finding of no significant impact ("FONSI") document for the bimodal spring rise plan to supplement its EA, and granted the Corps' motion for summary judgment. Missouri appealed to the Eighth Circuit Court of Appeals, arguing that because the prior Modified Conservation Plan did not involve a spring rise, an SEIS was needed because implementing the bimodal spring rise was a "substantial change" from the Corps' prior plan. The court rejected this argument, stating that changes which were considered in a prior FEIS and rejected were not "substantial changes" requiring an SEIS under 40 C.F.R. § 1502.9(c)(1)(I). The court indicated that a "substantial change" would need to be one "not qualitatively within the spectrum of alternatives" discussed in a prior FEIS in order to require an SEIS.

Missouri also argued that because none of the Corps' spring rise options in the FEIS were bimodal, an SEIS was required. The court rejected this argument also and found that the Corps' decision to not prepare an SEIS was not arbitrary or capricious under the Administrative Procedure Act standard. The court noted that the Corps' EA document compared the bimodal spring rise plan's effects to the four spring rise options in the FEIS, and concluded that there were no "significant new circumstances or information relevant to environmental concerns" necessitating an SEIS for the bimodal spring rise plan.

Missouri closed by claiming that in neglecting to issue an Environmental Impact Statement ("EIS") or FONSI with the EA, the Corps violated the NEPA. The court refused this argument as well, finding that since neither the Corps nor the Council on Environmental Quality's ("CEQ") regulations had set procedures on how to determine when an SEIS is needed, it was appropriate for the Corps to decide not to issue an SEIS in this case, especially since the effects of the bimodal spring rise plan had already been evaluated in the prior FEIS. As a result, the Eighth Circuit affirmed the district court's judgment.

SHEILA NEEDLES

U.S. v. Lucas, 2008 WL 274401 (5th Cir. 2008)

In *Lucas*, the court decision resolved an appeal from violations of the Clean Water Act (CWA) and conspiracy to violate the CWA by a corporate developer and various individuals who sold house lots and designed and certified septic systems for mobile homes on wetlands. Robert Lucas owned Big Hills Acre, Inc. (BHA, Inc.) and Consolidated Investments, Inc. He purchased a large parcel of land in Jackson County, Mississippi about eight miles from the Gulf of Mexico, which was called Big Hill Acres (BHA). Mr. Lucas sold mobile home lots from this property, however, the land was not connected to a central municipal waste system and the law required him to certify and install individual septic systems on each lot before he could sell them. In Jackson County, septic tanks must be approved by an engineer with the Mississippi Department of Health (MDH) or by an independent licensed engineer. Mr. Lucas originally used a MDH engineer to approve the septic systems, but, after finding out that the lots were on land that was saturated, the MDH withdrew many of its initial approvals. Mr. Lucas was forced to hire a private licensed engineer, M.E. Thompson, Jr. in order to have the septic systems approved. After the approval, Mr. Lucas's daughter, Robbie Lucas Wrigley, advertised the lots, showed them to buyers, and leased them.

After becoming concerned that Mr. Lucas was building houses and installing septic tanks on lots located on a wetland, the Army Corps of Engineers, the EPA, the MDH, and the Mississippi Department of Environmental quality (DEQ) issued multiple cease and desist orders against Mr. Lucas and Mr. Thompson. Additionally, the EPA sent letters to residents in BHA to warn them of the conditions of the lots and to inform them that wetlands were located on the property. The agency also met with BHA's counsel to authorize areas where it would allow development. However, when these efforts did not prove to be fruitful, the Government filed a 41-count indictment against Mr. Lucas, his company, and Mr. Thompson, charging them with the filling of wetlands without a Section 404 permit from the Corps, failing to obtain Section 403 National Pollutant Discharge Elimination System (NPDES) permits of the septic tanks, mail fraud, and conspiracy to commit mail fraud and for violating

Sections 402 and 404 of the CWA. A jury convicted the Defendants on all counts and the Defendants appealed that decision.

The court first addressed the issues of jurisdiction by the federal government over this claim by way of the CWA. First, the court found that the federal government did have jurisdiction because the wetland located of BHA property had a significant nexus to a navigable-in-act body of water and all of the connecting bodies of water flow into the Gulf of Mexico. The second jurisdiction issue involved the sufficiency of evidence to establish jurisdiction under the CWA. The court found that a rational trier of fact could have found the evidence established the elements of the claim beyond a reasonable doubt. The last issue regarding jurisdiction was that the CWA as applied to the regulation of wetlands was unconstitutionally vague. However, the court found that Mr. Lucas had sufficient notice of his violation of the CWA and state law by installing the septic systems and because his property had saturated soil with a network of creeks and tributaries leading to the Gulf of Mexico, some of which connected to the wetlands on his property.

The next issue addressed by the court dealt with the challenges to the sufficiency of the indictment and the jury instructions regarding the CWA's NPDES permitting requirements. In regards to the sufficiency of the indictment, the court found the evidence produced at trial was sufficient to support a finding that the septic systems were point sources and could be subject to NPDES permitting requirements under the CWA. Second, the court held that the jury instruction allowing a conviction for "causing" the discharge of pollutants was not an abuse of discretion because, although the individual lot owners used the septic systems that discharged the pollutants, Mr. Lucas was the cause of the operation and its unlawful discharge from the systems. The court affirmed the district court's decision on all counts.

BREANNE ARDILA

N.J. v. Envtl. Prot. Agency, 2008 WL 341338 (D.C. Cir. 2008)

New Jersey and fourteen additional States, the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection, the City of Baltimore and various environmental organizations challenged two final rules promulgated by the Environmental Protection Agency ("EPA") regarding the emission of hazardous air pollutants ("HAPs") from electric utility steam generating units ("EGUs"). The first rule ("the Delisting Rule") removed coal-and-oil fired EGUs from the list of sources whose emissions are regulated under section 112 of the Clean Air Act ("CAA"). The second rule, the Clean Air Mercury Rule ("CAMR"), set performance standards for new coal-fired EGUs under section 111, created total mercury emissions limits for states and established a voluntary cap-and-trade program for new and existing coal-fired EGUs. The two rules had the effect of shifting EPA regulation of power-plant emissions of mercury from the significantly more stringent standards of section 112 (governing HAPs) to the less stringent and more flexible standards under CAA section 11 (authorizing national emission standards for new stationary sources).

The CAA allows states to set emission limitations for individual stationary sources, such as power plants and factories. In general, the states have considerable flexibility as long as the cumulative effect of emissions within a state does not cause levels to exceed national air quality standards set by the EPA or other CAA requirements. However, for particularly harmful pollutants (HAPs), section 112 requires EPA to set uniform national standards for each category of stationary sources listed by EPA. Also, section 111 subjects newly constructed and newly modified stationary sources to EPA-prescribed "new source performance standards" (NSPSs).

In 1990, Congress amended the CAA, narrowing the EPA's discretion in implementing section 112 by requiring EPA to meet certain conditions before adding EGUs to the list of regulated HAP sources. Particularly, EPA is required to perform a study of anticipated hazards to public health that would occur as a result of emissions by EGUs, and if EPA determines that regulation is "appropriate and necessary" after considering the results of the study, it would regulate EGUs under section 112 (thereby setting uniform national standards). After completing a

study in 1998 and finding that that mercury emissions from EGUs present significant hazards to public health and the environment, EPA announced in 2000 that it was "appropriate and necessary" to regulate coal-and-oil fired EGUs under section 112. Accordingly, EPA added coal-and-oil fired EGUs to the section 112(c)(1) list of source categories. Under a consent agreement, the listing required the agency to propose Maximum Achievable Control Technology standards for those facilities by December, 2003 and finalize the standards by March, 2005.

However, contrary to its 2000 announcement, in 2005 EPA removed EGUs from the section 112 list and regulated mercury emissions from new coal-fired EGUs under section 111 instead, stating that regulation under section 112 was not "appropriate and necessary" after all. As a result, EPA claimed authority pursuant to section 111 to establish a national mercury emissions cap for new and existing EGUs and allocated a mercury emissions budget to each state along with a voluntary cap-and-trade program. The program would have allowed utilities to either control the pollutant directly or purchase excess allowances from other plants that have instituted controls more stringently or sooner than required. Also, early reductions could have been banked for later use. While this system would allow for more flexibility, it would have significantly delayed the reduction of overall emissions.

The petitioners contended EPA violated section 112's plain text and structure when it delisted the EGUs from section 112(c)(1). They argued that once EPA determined in 2000 that EGUs should be regulated under Section 112 and listed them under section 112(c)(1), EPA had no authority to delist them without taking the steps required under section 112(c)(9), such as determining that emissions would not exceed a level adequate to protect public health and finding that no adverse environmental effects would result from the emissions. EPA conceded that it never made the findings section 112(c)(9) would require. Therefore, the court agreed that EPA's removal of EGUs from section 112 violated the CAA's plain text.

In an attempt to evade the CAA's plain text, EPA argued that it possessed authority to remove EGUs from section 112 list under the principle of administrative law that an agency has inherent authority to reverse an earlier administrative ruling. The court agreed that an agency can normally change its position, but Congress can limit and agency's

discretion to reverse itself, and in section 112(c)(9), Congress did just that, unambiguously limiting EPA's discretion to remove sources. Also, EPA argued that it had previously removed sources from section 112 without satisfying the requirements of section 112(c)(9), but the court found that previous violations do not excuse the violation currently before the court.

Therefore, the court vacated the agency's delisting rule and required vacation and remand of its section 111 regulations for mercury emissions from new and existing EGUs. Because section 112 does not authorize EPA to establish a cap-and-trade program, EPA will also have to impose Maximum Achievable Control Technology standards on each individual EGU listed in section 112. The decision is a setback to the Bush administration's efforts to provide flexibility and ease restrictions for coal-fired power plants.

MICHAEL J. QUILLIN

Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc., 2008 WL 351688 (9th Cir. 2008)

Inlet Fisheries, Inc. and Inlet Fish Producers, Inc., (together known as "Inlet") are businesses that buy and process fish out of Alaska. The Underwriters at Lloyds are those syndicates at Lloyd's of London who agreed to underwrite a stand-alone pollution insurance policy issued to Inlet in August 2000. The prior provider of stand-along vessel pollution insurance was Water Quality Insurance Syndicate ("WQIS"). WQIS sent notice in August 2000 that it was canceling the insurance for numerous reasons, including Inlet's failure to conduct surveys of its vessels as requested by WQIS because several vessels had spilled or sunk with thousands of gallons of oil on board. A day after the cancellation notice was sent, another one of Inlet's vessels spilled approximately 55 gallons of oil off the coast of Alaska.

Inlet then sought insurance from Lloyds for its remaining vessels. It is what Inlet provided on the application that is in dispute in the instant case. In the response to "pollution loss history," Inlet wrote "None." The form did not ask for information about Inlet's vessels, financial status, or reasons for WQIS's reasons for cancellation. Two years later in August 2002, another one of Inlet's vessels sank and spilled oil. Inlet made a claim to Lloyds under its vessel pollution insurance, and Lloyds investigated the accident and Inlet in general. Lloyds filed suit seeking declaratory judgment to void the policy ab initio under the doctrine of uberrimae fidei after it learned about the previous oil spills, the poor condition of the vessels and a pending bankruptcy. Inlet tried to argue that Alaska state law applied, but the district court granted Lloyd's motion and ruled that the federal rule of uberrimae fidei applied.

The doctrine of ubberimae fidei means that both parties to an insurance contract were held to the highest standard of good faith. It is required that the insured fully and voluntarily discloses to the insured all material facto to a calculation of insurance risk. The issue here is that Lloyds did not ask for this information, but under ubberimae fidei, Inlet should have disclosed this information voluntarily. The Sixth Circuit held that a life insurance policy was void under ubberimae fidei because the insured failed to disclose two heart attacks. The Fifth Circuit held an in insurance policy void in the maritime context when the insured failed to

disclose the poor condition of its boats. The Supreme Court held in Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) courts should look to federal admiralty law first, and if non available, then state law may be used. Inlet tried to argue that ubberimae fidei was not a established maritime law, but the Court disagrees. The Eleventh Circuit stated that ubberimae fidei was the controlling law in that court, and this court agreed.

This court also agreed with other circuits in applying ubberimae fidei as an disclosure issue and not one of solicitation. This is an big area of dispute between the two parties. Inlet argues that Lloyds did not solicit information about its business history, however the real issue is whether Inlet knew of material information that it failed to disclose. Lloyds was able to prove with more than sufficient evidence that the prior oil spills, the sunken ship and WQIS's cancellation of its insurance was enough to affect its decision to offer the insurance.

JERRI ZHANG

City of Dallas, Texas v. Hall, 2007 WL 3125311 (N.D. Tex. 2007)

The City of Dallas, Texas (the "City") and the Texas Water Development Board (the "State") (collectively, "Plaintiffs") claimed to have been considering land around the upper Neches River for the Fastrill Reservoir. Meanwhile, as early as 1985, the Fish and Wildlife Service ("FWS") asserted they began considering the same land as a site for the Neches River National Wildlife Refuge ("Refuge"). The City sought to collaborate with FWS to meet the dual goals of water supply and wildlife preservation, but negotiations between the parties never realized a plan encompassing both parties' interests. As a result, on June 11, 2006, the Director of FWS stated time for collaboration had ended and approved the FWS' Environmental Assessment ("EA") and subsequent Finding of No Significant Impact ("FONSI"), designating the disputed land as a refuge. To this end, FWS began quickly acquiring land and obtained a one-acre conservation easement from James and Annie Younts ("the Younts").

The City and State filed separate, similar lawsuits against FWS, the United States Department of the Interior (collectively, "Federal Defendants") and the Younts. These lawsuits were consolidated and transferred to United States District Court for the Northern District of Texas. At issue in the instant case are [1] the Federal Defendants' partial motions to dismiss the Plaintiffs' claims and [2] the Younts' motion to dismiss. The City's alleges [1] Federal Defendants failed to comply with executive orders 13,132 and 13,352; [2] the one-acre conservation easement is void because it is contrary to the requirements of the National Wildlife Refuge System Administration Act ("NWRSAA") and the Administrative Procedure Act ("APA"); [3] the FWS violated the APA by accepting the one-acre easement in bad faith; and [4] the Federal Defendants prevented the City from securing a sufficient water supply for its citizens in violation of the Tenth Amendment and the City's right to sovereignty. Also at issue are the State's substantially similar claims including [1] violation of the executive orders and [2] the one-acre conservation easement is void as a matter of the Texas Natural Resources Code.

To the claim that it violated executive orders 13,132 and 13,352, Federal Defendants responded the executive orders created no private right of action. Plaintiffs' nonetheless claimed non-compliance with the

executive orders was a violation of the National Environmental Policy Act ("NEPA"). In dismissing Plaintiffs' claims, the court reasoned that because Federal Defendants had not considered the executive orders in their NEPA analysis, non-compliance with those executive orders was not subject to the instant court's review.

In regards to the one-acre conservation easement, the City argued the easement was void because the Federal Defendants failed to acquire water rights to the land before acquiring the property in violation of NWRSAA. The State argued FWS' easement was void as a matter of the Texas Natural Resources Code. Federal Defendants responded [1] the FWS' title can only be challenged through the Quiet Title Act ("QTA"), under which the City has not asserted jurisdiction; [2] the City lacked standing under NWRSAA because loss of opportunity to construct a reservoir is not within the "zone of interest" NWRSAA protects; and [3] NWRSAA does not require the acquisition of water rights before acquisition of an easement. Because the City and State were not challenging the federal government's title and did not possess the type of property interest necessary for maintenance of a quiet title action, the court concluded the QTA was inapplicable. However, the court agreed with Federal Defendants in that the City lacked standing under NWRSAA and the State lacked standing under the Texas Natural Resources Code. Consequently, the court dismissed these claims.

Against the allegation they had accepted the one-acre conservation easement in bad faith and in violation of the APA, Federal Defendants argued the claim should be dismissed because APA review could only be conducted within the meaning of a relevant statute, and the City had not alleged a relevant statute for its bad faith claim. In dismissing the City's claim, the court agreed there was no statutory basis for the APA claim, so the City was not entitled to judicial review.

The City claimed the FWS had exceeded its authority by depriving the City of its constitutional right to secure a water supply for its citizens and violated the City's Tenth Amendment right to sovereignty. The court concluded it could not accept the City's Tenth Amendment claim because the bases for this claim were factual allegations in a brief, which could not be considered on a motion to dismiss for failure to state a claim. The court also concluded the City had not provided any authority that it had a "right" to secure a water supply for residents and dismissed the City's claims.

Finally, the court addressed the Younts' motion to dismiss for failure to state a claim. The City argued the Younts were an indispensable party because they have an interest in the property that would be affected by the court's ruling. The court granted the Younts' motion to dismiss because the court had already dismissed the City's claims which would have entitled the City to rescission of the one-acre conservation easement. After dismissal of these claims, the Younts no longer had an interest in property that would be affected by the court's ruling and were no longer an indispensable party. The court granted the Younts' motion to dismiss.

After granting all Federal Defendants' and the Younts' motions to dismiss, the City notified the court of its intention to amend its claim against the conservation easement, adding the allegation that the FWS had failed to comply with its own policies. The FWS had not secured secretary approval of the easement; consequently, the City alleged the easement was invalid and no refuge had been established. The court granted Plaintiffs ten days to file a newly amended complaint.

JOSEPH SCHLOTZHAUER

U.S. v. Brock-Davis, 504 F.3d 991 (9th Cir. 2007)

In *Brock-Davis*, the Ninth Circuit had the opportunity to decide a case determining the extent of restitution that is proper under the Mandatory Victim Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663(A) following a conviction for manufacturing methamphetamine.

On October 15, 2005 Defendant Brock-Davis and Codefendant Perry Willingham checked into a motel room in Missoula, Montana. Three days later, while the two defendants were temporarily away from the room, a housekeeper discovered a white powdery substance and a microwave oven in the room. Believing the items found to be part of a meth lab, she notified the manager who then contacted the police. The police arrested Both Brock-Davis and Willingham and during the search of the trunk of their car, the police found other necessary components to manufacture methamphetamine, including cold tablets, beakers, and liquid methamphetamine.

Shortly after being arrested, Willingham told Missoula Police that they better check the Aero Inn in Kalispell, specifically room 107. The Missoula Police contacted the Kalispell police who did in fact check the room and found more evidence consistent with a meth lab, as well as an ice bucket with purple stains, a white powdery substance in the bathroom, and a microwave oven box matching the microwave oven found in Missoula. Brock-Davis was identified by one of the Aero Inn employees as the patron renting the room. Defendant Brock-Davis was charged with and plead guilty to conspiracy to manufacture methamphetamine under 21 US.C. § 841(a)(1) and 21 U.S.C. § 846.

After the arrest the owner of the Aero Inn, Gilbert Bissell, on suggestion from the police, spent two days with one of the housecleaners cleaning room 107 with bleach. None the less, about a month later, the Montana Department of Environmental Quality (MDEQ) notified Bissell that room 107 had been listed as a "hazardous meth site," and thus unsuitable for occupation. This was based on a report from the Kalispell police. To have it taken off the list meant having it decontaminated by an approved agency in a manner outlined in the Montana Administrative Rules. Bissell hired WTR Consulting Engineers off of MDEQ's approved list who proceeded over the next six months to decontaminate the room.

This process included cleaning, disposing of the room's furniture, doors, and having the room shut down for the six month period.

The government in their pre-sentence investigation report suggested, and the trial court agreed, that under the MVRA, Brock-Davis be ordered to pay restitution of $13,248.45 to the Aero Inn for damages caused by the meth lab in room 107. Brock-Davis contested this recommendation and on appeal argued MVRA did not authorize restitution be paid under the circumstances of her conviction. The Ninth Circuit though disagreed, in part. They first interpreted the statute, holding "The MVRA limits restitution for an offense resulting in damage to or loss or destruction of property to either the return of the property or, if that is 'impossible, impracticable, or inadequate,' to payment of 'the greater of...the value of the property on the date of the damage, loss, or destruction; or ...the value of the property on the date of sentencing, less...the value(as of the date the property is returned) of any party of the property that is returned." 18 U.S.C. § 3663(A)(b)(1). For guidance in their construction of this statute, the Court looked to a similarly worded statute, the Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663 and to the construction given by other circuits.

In the Third, Fourth, and Seventh Circuits when dealing with property damage caused by certain offenses that are similar to the damage caused by a meth lab, mainly requiring decontamination by a hazmat team, they have all held that "clean-up or repair costs may be ordered under the MVRA." This outcome is consistent with the purpose of the MVRA which was stated by the court that "the primary and overarching goal of the MVRA is to make victims of crime whole."

Brock-Davis also unsuccessfully argued that Bissell was entitled to restitution because he was "not directly and proximately harmed by the criminal conduct to which she plead guilty," that being conspiracy to manufacture methamphetamine. Her indictment did not reference the Aero Inn room 7, Bissell, nor Kalispell and thus she argued they were not a victim of the crime she plead guilty to. The court disagreed because of an earlier holding interpreting the term victim to be broadly construed, they held that "when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense,... the restitution order may include acts of related conduct for which the defendant was not convicted." Then applying that interpretation to the facts of this case, the

court found that each motel room was at the minimum a partial meth lab created by Brock-Davis, and the items found in the trunk of the car would have "supplemented either lab (or even constituted the lab itself) at the motels." Thus, the fact that the Kalispell motel wasn't mentioned in the indictment doesn't prevent it from recovering restitution when room 107 itself was part of the conspiracy to manufacture meth.

Lastly, the court stated that "a cleanup and contamination effort conducted by local emergency response agencies was a necessary and foreseeable result of the defendant's offense conduct." They then held that because Bissell had to decontaminate room 107 in order to be able to use it and the contamination was a result of Brock-Davis' criminal conduct, she properly bore the loss.

RYAN STARNES

American Bird Conservancy, Inc. v. F.C.C., 2008 WL 425529 (D.C. Cir. 2008)

The American Bird Conservancy and Forest Conservation Council sought review of a Federal Communications Commission ("FCC") order that denied in part and dismissed in part petitioners' requests concerning the protection of migratory birds from collisions with communications towers in the Gulf Coast. The Court of Appeals for the District of Columbia deferred to the FCC's decision on one point, but remanded the order back to the FCC as arbitrary and capricious because it failed to adequately address the issues raised by the petitioners.

On August 26, 2002, troubled by the issue of "tower kill," the petitioners made several formal requests to the FCC. They asked the FCC to prepare an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"). They also asked the FCC to formally consult with the Fish and Wildlife Service ("FWS") in accordance with the Endangered Species Act ("ESA") concerning the impact of the towers on endangered bird species. Additionally, petitioners requested the FCC to take action to reduce bird mortality at tower locations pursuant to the Migratory Bird Treaty Act ("MBTA"). Finally, the petitioners asked the FCC to give them notice and an opportunity to be heard before approving additional tower registration applications.

In August of 2003, while still considering the petitioners' requests, the FCC issued a Notice of Inquiry to obtain more information on the nationwide impact of communications towers on migratory birds. The agency undertook this action in order to determine if its rules needed to be changed in order to provide better protection for migratory birds. Before completion of the nationwide analysis, in April 2005, the FCC responded to petitioners' concerns by issuing its order. The Commission dismissed the migratory bird issue, reasoning that it would be addressed the separate nationwide proceeding, and denied the petitioners' other requests.

The court ruled that the FCC acted reasonably in deferring consideration of the MBTA issue to the ongoing nationwide proceeding, however, it found that the Commission acted arbitrarily and capriciously by denying the petitioners other requests. The court noted that while FCC regulations governing the application of NEPA categorically exclude communications towers from requiring an EIS or an Environmental

Assessment ("EA"), a party can still make a challenge that a particular action in such category will have a significant environmental impact. The court concluded, based upon conflicting data regarding the number of birds killed, that the FCC was at least required to prepare an EA and make a finding of no significant impact to support its decision not to prepare an EIS. Regarding the petitioners' request that the FCC consult with the FWS over the cumulative effects of the towers on endangered species, the court held that the FCC gave an inadequate explanation for determining that its action would not affect endangered species habitats. The court reasoned that by merely stating that there was no evidence of "synergies" among the towers to conclude that the towers did not have a cumulatively significant environmental impact, the FCC impermissibly foreclosed virtually any possible request under this provision of the ESA. Finally, the court ruled that the FCC's policy of providing public notice only after approving tower applications did not provide petitioners with a meaningful opportunity to participate in NEPA procedures as required by regulation.

The dissent maintained that, even though the FCC order technically constituted a final agency action, because the Commission had not yet completed its proceeding involving the migratory bird question on a national level, the issue was not ripe for review.

VALERIE NICKLAS

Earth Island Institute v. Ruthenbeck, 490 F.3d 687, 691 (9th Cir. 2007)

On January 18, 2008 the Supreme Court granted certiorari to hear Earth Island Institute v. Ruthenbeck. The Plaintiff-Respondent in the instant case, Earth Island, is challenging the promulgation of several Forest Service regulations, which they contend unconstitutionally exempt certain categories of Forest Service activities from administrative notice, comment, and appeal.

The challenged regulations have the effect of categorically excluding certain fire rehabilitation activities from Environmental Assessment ("EA") or Environmental Impact Statement Analysis ("EIS"). When read together the regulations had the additional effect of excluding the project from administrative notice, comment, and appeal.

Earth Island's complaint centers around, inter alia, the above regulations as applied to the Burnt Ridge Project decision memo, although notably the Forest Service had not yet carried through with the Burnt Ridge Project. The district court found for Earth Island, invalidating the aforementioned regulations and issuing a nationwide injunction against their application. The Forest Service appealed the decision.

Before the Ninth Circuit heard the appeal the Forest Service and Earth Island were able to reach an agreement regarding the Burnt Ridge Project the dispute was settled and dismissed with prejudice. Nevertheless, the Ninth Circuit chose to allow the challenge to the two regulations which had been applied to the Burnt Ridge Project Memo and uphold the district court's invalidation of them.

The Forest Service challenges several aspects of the Ninth Circuit's decision to continue to rule on the validity of the regulations after the underlying conflict is dismissed. Among the Forest Service's challenges they claim that because the agency did not go through with the Burnt Ridge Project that the regulations were not ripe for review. The Forest Service also contends that Earth Island's complaint became non-justiciable when they settled their challenge to the Burnt Ridge Project.

Although this case may seem at first brush as simply a fact-specific dispute, with no real consequences reaches further than the destiny of Burnt Ridge, what is actually at stake is much greater. The regulations in the instant case set up procedures for a special government program, under

which the Burnt Ridge Project was undertaken. Instead of simply challenging the Burnt Ridge Project, Earth Island is now attempting to challenge the underlying regulations and in turn a much more broad regulatory apparatus set up by the Forest Service to deal with common problems associated with forest fires.

The Court is now faced with the question of whether a challenger to a regulation setting up a special government program can challenge the regulations itself or if that challenge is limited to a particular project undertaken under the new program. The court's decision accompanied with the precedent set here of a national injunction on the challenged regulations application could have devastating effects on agency autonomy and ability to create special programs for common problems which they face.

RYAN TICHENOR

Defenders of Wildlife v. Chertoff, 527 F.Supp.2d 119 (D.D.C. 2007)

In *Defenders of Wildlife v. Chertoff*, the plaintiffs, Defenders of Wildlife and the Sierra Club, filed suit in the United States District Court of the District of Columbia against the Secretary of Homeland Security, Michael Chertoff, challenging the constitutionality of §102 of the REAL ID Act of 2005. The controversy arose in September 2007.

The Department of Homeland Security (DHS) wanted to begin construction of a border fence along the United States/Mexico border. The fence would have run along road and drainage structures within the San Pedro Riparian National Conservation Area (SPRNCA) in Arizona. SPRNCA is managed by the Bureau of Land Management (BLM), which did a complete environmental assessment before granting a right-of-way to begin fence construction, determining that such construction would have no impact on the environment when paired with certain mitigation precautions. Plaintiffs objected to the construction of the fence, arguing that SPRNCA was "a unique and invaluable environmental resource," and "one of the most biologically diverse areas of the United States." However, BLM reported that no Environmental Impact Statement was required under the National Environmental Policy Act (NEPA) of 1969. In response, Plaintiffs filed action in early October 2007 and simultaneously moved for preliminary injunctive relief to stop construction. Their motion claimed that BLM's environmental assessment was inadequate, and that NEPA required a full Environmental Impact Statement. In addition, Plaintiffs claimed that BLM's right-of-way violated the Arizona-Idaho Conservation Act of 1988, which directs BLM to manage SPRNCA in a "protective and enhancing manner," and to only allow SPRNCA to be used for which it was established. The District Court for the District of Columbia granted the plaintiffs' motion for a temporary restraining order, finding a substantial likelihood of success on the merits with respect to Plaintiffs' NEPA claims, and construction was halted.

The victory was short-lived; by late October, DHS Secretary Chertoff published a notice in the Federal Register waiving NEPA, the Arizona-Idaho Conservation Act, and 18 other laws with respect to the construction of the fence. Secretary Chertoff claimed waiver authority under §102 of the REAL ID Act of 2005, asserting the waiver was

necessary in order for the fence to be built, and that the waiver met the requirements laid out in §102. Subsequently, the District Court for the District of Columbia vacated the temporary restraining order, and the plaintiffs amended their complaint to allege that the waiver provision of §102 violated separation of powers principles under Articles I and II of the Constitution. In response, the defendants moved to dismiss the complaint, arguing that based on the Supreme Court's nondelegation line of cases, it is constitutionally permissible for the legislature to delegate power to the executive branch.

The District Court for the District of Columbia rejected Plaintiffs' arguments, ultimately siding with the Secretary. The Court determined that the Secretary's waiver authority under the REAL ID Act did not violate separation of powers and was therefore constitutional. Rejecting claims by the plaintiffs that such power was unprecedented and even equal to the unconstitutional line item veto, the Court deemed such power to be within the broad scope of the Executive Branch. It reasoned that the Executive has general authority over matters of foreign policy and security; therefore, any delegation by Congress to the Executive on these issues will almost always be constitutional, regardless of how broad the power is.

Missouri Courts' response to this ruling could be one of two things. Either Missouri will support this decision, favoring the judicial interpretation of appropriate authority over deferral to an agency interpretation. Missouri has shown reluctance to defer to an agency interpretation in the past, so it is quite possible that it will rely on this decision as further support against adopting the *Chevron* doctrine. However, it is possible that Missouri Courts will reject this decision, showing reluctance to give so much credit to an agency interpretation. Thus, Missouri's approval or rejection of *Defenders of Wildlife* depends on how it analyzes the District Court's decision- was it judicial interpretation of an act, or was it an agency's interpretation of an act upheld by the judiciary? Missouri's answer will be an indication of whether such measures can be taken in this state.

LAUREN SANDWEISS

Missouri v. United States Army Corps of Engineers, et al., 2008 U.S. App. LEXIS 2802 (8th Cir. 2008).

The State of Missouri brought suit against the United States Army Corps of Engineers ("Corps") under the National Environmental Policy Act ("NEPA"). Missouri alleged the Corps, through the implementation of revisions to the Missouri River Mainstem Reservoir Master Water Control Manual ("Master Manual") and its failure to prepare a supplemental environmental impact statement, violated the NEPA.

The Corps had prepared an assessment that included an evaluation of a plan for a bimodal spring rise through which water would be released from a dam in an effort to support endangered or threatened species. The assessment found there was no new environmental impacts that were significant that had not been previously evaluated in an environmental impact statement. Additionally, the Master Manual was edited to include the plan for the bimodal spring rise.

The United States District Court for the District of Minnesota granted the Corp's motion for summary judgment, dismissing Missouri's claims. This led Missouri to appeal to the United States Court of Appeals for the Eighth Circuit.

In its opinion, the Eighth Circuit held the revision to the Master Manual did not constitute a substantial change, a change that would have required a supplemental environmental impact statement ("SEIS") under 40 C.F.R. § 1502.9(c)(1)(i).

The court cited the alternatives for the spring rise previously considered in the SEIS as the reason a new SEIS was unnecessary. The court held the environmental assessment compared possible impacts of the proposed bimodal rising of the spring to other options and concluded the bimodal spring raising was permitted under the range of impacts previously studied by the Corps. Finally, the court found the Corp's use of an environmental assessment to evaluate the necessity of an SEIS was not a misuse of the environmental assessment procedures or in violation of the NEPA as a whole.

DAVID ZUGELTER